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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 111.

WILLIAM SAMUEL BIGBY, PLAINTIFF IN ERROR,

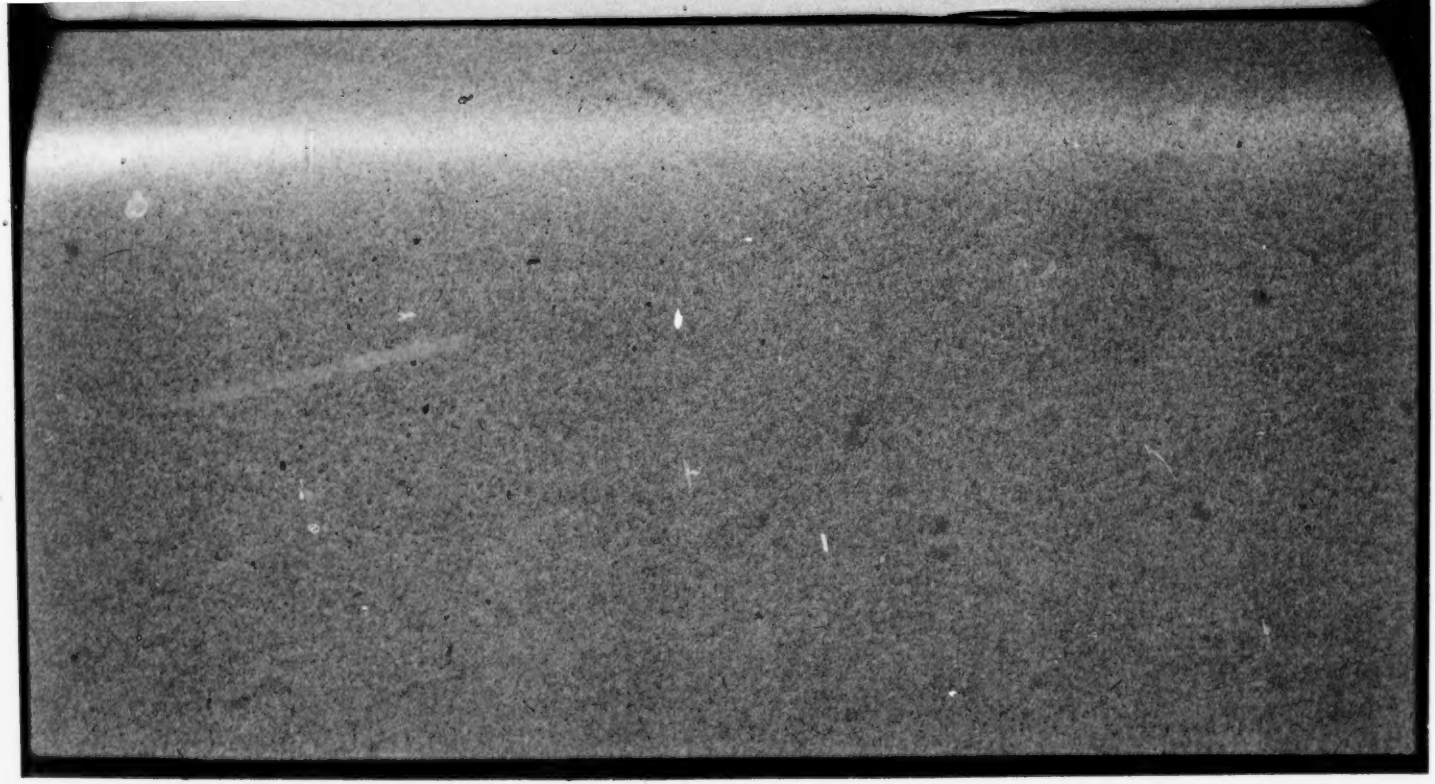
*vs.*

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED JUNE 1, 1901.

(18,191.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 28, 1902.

1 Circuit Court of the United States for the Eastern District of New York.

WILLIAM SAMUEL BIGBY
*against*
THE UNITED STATES OF AMERICA.

SIRS: Please take notice that the within amended petition was duly filed with the clerk of the circuit court of the United States for the eastern district of New York on the 27th day of November, 1899, which court has jurisdiction of the case set forth in said petition and in which district plaintiff resides.

New York, November 27th, 1899.

Yours &c.,
ROGER FOSTER,
*Attorney for Plaintiff, Petitioner, 35 Wall Street, Borough of Manhattan, New York.*

To the honorable the Attorney General of the United States and to the honorable the attorney of the United States for the eastern district of New York.

2 Circuit Court of the United States for the Eastern District of New York.

WILLIAM S. BIGBY
*against*
THE UNITED STATES OF AMERICA.

And now comes the plaintiff and petitioner and amends the petition heretofore filed by him herein so as to change his name wherever the same occurs in the title and in the body of said petition, from William S. Bigby to William Samuel Bigby. A copy of the petition as amended is hereto annexed.

New York, November 27th 1899.

Yours &c.,
ROGER FOSTER,
*Attorney for Plaintiff, Petitioner, 35 Wall Street, Borough of Manhattan, New York.*

3 Circuit Court of the United States for the Eastern District of New York.

WILLIAM SAMUEL BIGBY
*against*
THE UNITED STATES OF AMERICA.

To the honorable the judges of the circuit court of the United States for the eastern district of New York and to the honorable the circuit court of the United States for the eastern district of New York:

Your petitioner, by Roger Foster his attorney respectfully shows:—

I. The United States of America is a corporation created by the

Constitution of the United States with its principal office in the city of Washington and the District of Columbia; and your petitioner alleges upon information and belief, that within the meaning of the definitions of the New York Code of Civil Procedure said United States of America is a foreign corporation.

II. Your petitioner resides at Nos. 29 and 31 De Kalb avenue in the borough of Brooklyn, county of Kings and city of New York; and in the eastern district of New York.

III. On or about November, 27th, 1899, your petitioner at the request of the said United States of America and at the request of the officers, employees and duly authorized agents of the said
4 United States of America, each of which officers, agents and employees was acting within the scope of his authority, entered into a passenger elevator in the United States court-house and post-office building in said borough of Brooklyn, which said building and elevator were then owned and controlled by the United States of America and which elevator was designed and intended by the said United States of America for the use of persons on their way to the office of the marshall of the United States for the eastern district of New York; which entry was made by our petitioner while on his way to the said marshall's office upon official business.

IV. The United States of America then and there entered into an implied contract with your petitioner wherein and whereby for a sufficient valuable consideration it agreed to carry your petitioner safely; to operate said elevator with due care; and to employ for the purposes of the operation of said elevator a competent and experienced person.

V. In violation of said contract said United States of America failed to carry your petitioner safely; and failed to operate said elevator with due care; and failed to employ for the operation of said elevator and to put in charge of the same a competent and experienced person; and violated its said contract with your petitioner in other ways.

VI. In consequence of the failure of the United States and of its employees in charge of said elevator to carry your petitioner
5 safely and to operate said elevator with due care; and in consequence of the failure of the United States to employ a competent and experienced person to operate said elevator; and in consequence of the incompetence and inexperience of the person then engaged in operating said elevator and in charge of the same, and in consequence of the said violation by the United States of its said contract your petitioner while entering the said elevator without negligence on his part was caused to fall and his foot, ankle and leg were crushed between said elevator and the top of the entrance into the elevator shaft or a projection in the shaft of said elevator or in some other manner and the back of your petitioner and other parts of the body of your petitioner were also consequently injured and your petitioner consequently suffered a laceration of the ligaments of his ankle and he consequently was caused much bodily and mental pain.

VII. In consequence thereof your petitioner was obliged to spend

and incur considerable sums of money for medical and surgical attendance and he was confined to the house and prevented from attending to his business and from earning money for a considerable period of time and he has been made permanently lame and his said foot, ankle and back have been permanently injured; and he has been thus and otherwise damaged, in the sum of ten thousand dollars ($10,000).

Wherefore, your petitioner prays for a judgment or decree
6 against the United States of America upon the facts and law for the sum of ten thousand dollars ($10,000) together with his reasonable costs and disbursements and for such other and further relief in the premises as may be just.

WILLIAM SAMUEL BIGBY, *Petitioner.*
ROGER FOSTER,
*Petitioner's Attorney, 35 Wall Street, New York.*

7 STATE OF NEW YORK, }
*County of Kings, Eastern District of New York,* } *ss:*

William Samuel Bigby, being duly sworn, deposes and says: I am the above-named petitioner. The foregoing petition is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

WILLIAM SAMUEL BIGBY.

Sworn to before me this 27th day of November, 1899.

E. M. SMITH, [SEAL.]
*Notary Public, Kings County, New York.*

Endorsed: Amendment to petition, notice and amended petition Filed November 27, 1899.

8 Circuit Court of the United States for the Eastern District of New York.

WILLIAM SAMUEL BIGBY
*against*
THE UNITED STATES OF AMERICA. }

COUNTY OF NEW YORK, *ss:*

Edward Harding, being duly sworn, deposes and says: I reside in the borough of Manhattan, in the county and State of New York. I am of the age of 21 years and upwards. On the 27th day of November, 1899, I served the amendment herein, the amended petition, together with a notice that the said amendment and said amended petition had been filed on the 27th day of November, 1899, in the office of the clerk of the circuit court of the United States for the eastern district of New York by delivering to and leaving with an assistant district attorney in charge of the office of said district attorney, a true copy thereof; the said district attorney being then absent there-

from. Deponent further says that on the aforesaid day he mailed a copy of the aforesaid papers, postage prepaid, by registered letter, in the post-office in the borough of Brooklyn in the county of Kings, and State of New York addressed to the "Hon. John W. Griggs, Attorney General of the United States, Washington, D. C."

EDWARD HARDING.

Sworn to before me this 28th day of November, 1899.

E. J. ESSELSTYN,
*Notary Public, N. Y. Co.*

9 At a stated term of the circuit court of the United States for the eastern district of New York, held in the Post-office building in the borough of Brooklyn, city of New York and county of Kings on the 19th day of May, 1900.

Present: Hon. Edward B. Thomas, district judge.

WILLIAM SAMUEL BIGBY
*against*
UNITED STATES OF AMERICA.

After hearing Roger Foster, Esquire of counsel for the petitioner and plaintiff above named and George H. Pettit, Esq., United States district attorney being present in court and not opposing, on motion of Roger Foster, attorney for plaintiff and petitioner, it is,

Ordered, that the amended petition herein be and the same hereby is amended by changing the date from "1899" in paragraph III thereof to "1893," without prejudice to the demurrer herewith filed to said petition, which amendment shall take effect *nunc pro tunc* as of November, 27th, 1899 when said petition was filed.

EDWARD B. THOMAS,
*District Judge.*

Endorsed: Order amending petition. Filed & entered May 19, 1900.

10 Circuit Court of the United States for the Eastern District of New York.

WILLIAM SAMUEL BIGBY
*against*
UNITED STATES OF AMERICA.

COUNTY OF NEW YORK, *ss:*

Edward Harding, being duly sworn, deposes and says: I reside in the county and State of New York. I am of the age of twenty-one years and upwards. On the 29th day of May, 1900, I served the foregoing proposed order with notice of settlement, on George H. Pettit, Esquire, United States district attorney for the eastern district of New York, by depositing in a post-office box in the county of New York, maintained by the Government of the United States, a copy of the same, contained in a securely closed postpaid wrapper,

directed to the said Pettit at the Post-office building, Brooklyn, New York.

EDWARD HARDING.

Sworn to before me this 31st day of May, 1900.

E. J. ESSELSTYN,
[L. S.] *Notary Public, N. Y. Co.*

11 United States Circuit Court for the Eastern District of New York.

WILLIAM SAMUEL BIGBY
*against*
UNITED STATES OF AMERICA.

Please to enter my appearance as attorney for the defendant in the above-entitled cause.

GEORGE H. PETTIT,
*Attorney for Defendant.*

Dated, Jan. 24, 1900.

To the clerk of the circuit court of the United States for the eastern district of New York.

Endorsed: Notice of appearance Filed and entered the 24th day of Jan'y 1900.

12 Circuit Court of the United States for the Eastern District of New York.

WILLIAM SAMUEL BIGBY
*vs.*
UNITED STATES OF AMERICA. } Demurrer.

To the honorable the judges of the circuit court of the United States for the eastern district of New York and to the honorable the circuit court of the United States for the eastern district of New York:

Now comes the defendant, The United States of America, into this court, by George H. Pettit, United States attorney for the eastern district of New York, who appears specially herein, for the sole purpose of demurring to the petition of William Samuel Bigby, petitioner in the above-entitled action, upon the following grounds:

First. The United States of America demurs to the petition of William Samuel Bigby, petitioner herein, upon the ground that it appears upon the face of the petition that the court has no jurisdiction of the person of the defendant.

Second. The United States of America demurs to the petition of William Samuel Bigby, petitioner herein, upon the ground that it appears upon the face of the petition that the court has no jurisdiction of the subject of the action.

Third. The United States of America demurs to the petition
13 of William Samuel Bigby, petitioner herein, upon the ground that it appears upon the face of the petition that said petition does not state facts sufficient to constitute a cause of action.

Wherefore the defendant, United States of America, prays that the petition of the plaintiff, William Samuel Bigby herein, be dismissed, together with reasonable costs and disbursements to the defendant, and for such other and further relief in the premises as may be just.

GEORGE H. PETTIT,
*United States Attorney and Attorney for the Defendant,*
*Post-office Building, Brooklyn, N. Y.*

Endorsed: Demurrer Filed January 24, 1900.

14 United States Circuit Court for the Eastern District of New York.

WILLIAM SAMUEL BIGBY
*vs.*
THE UNITED STATES OF AMERICA.

AUGUST 9, 1900.

Roger Foster, Esq., attorney for plaintiff.
George H. Pettit, Esq., U. S. attorney.

THOMAS, *J.:*

The demurrer is to a petition stating in effect that the petitioner, while on his way to the marshal's office, in the Post-office building in the city of Brooklyn, was injured by the incompetence of a person in charge of an elevator in said building, operated by the United States, which was a breach of an implied contract whereby the United States agreed to carry the petitioner safely. The cause of action exists, if at all, under that part of the Tucker act, of March 1887 (24 Stat. at Large 505) which permits recovery against the United States for claims founded "upon any contract, expressed "or implied, with the Government of the United States, or for dam-"ages, liquidated or unliquidated, in cases not sounding in tort, in "respect of which claims the party would be entitled to redress "against the United States either in a court of law, equity, or ad-"miralty, if the United States were suable."

The elevator is the usual passenger elevator employed in build-
15 ings of the United States, and is devoted solely to the purpose of the Government. The United States was not a common carrier in the operation of such elevator, for "no one can "be considered as a common carrier unless he has, in some way, held "himself out to the public as a carrier, in such manner as to render "him liable to an action if he should refuse to carry for any one who "wished to employ him." (Allen *v.* Sackrider, 37 N. Y. 341, 342.) Neither did the United States expressly stipulate with the petitioner for his carriage, nor did the law imply such undertaking. The law

does not imply a contract to carry even in the case of common carriers. It often happens that a common carrier of goods does make a contract for their transportation. Under existing modes of business such contracts are usually made by such carriers, although infrequently by common carriers of passengers. If an expressed contract to carry exists, the declaration may be upon the contract, although the offended person may declare upon the duty imposed by law. But when there is a mere refusal to carry, or injury or delay, the declaration should be upon the duty implied by law, and not upon the contract, unless there be some negotiation between the parties tantamount to an agreement. In other words, a contract to carry is not implied. If it exists it is because it has been expressed; for where the law imposes the duty to carry, it would be idle to imply a contract to carry. When the law commands something to be done, it need, and does not resort to the fiction that the party commanded impliedly contracted to do the act. Hence there is no implied contract for the reasons stated, even if the United States be regarded as a common carrier. But the true relation of the parties in fact and legal theory is this: For the purpose of transacting
16 business with its officials, the United States extended to the petitioner a license to enter its building and to use in connection therewith the facilities for passing from floor to floor. This permission imposed a duty upon the Government. The duty respecting its elevator was similar to that relating to the safety of the floors, stairs, or any other part of its building. The duty was the same as that imposed upon the owner of any building having a public relation. The duty grew out of a permission to enter and to use the building for the purpose for which it was intended. This permission imposed upon the United States the duty to use ordinary care that the facilities offered to its licensees should be in a state of reasonable safety, and a breach of such duty would constitute culpable negligence. Hence the declaration in the present case must be in tort, which brings the case within the exception stated in the Tucker act. The learned counsel for the petitioner urges that a license to enter private premises is a contract expressed or implied accordingly as the license is expressed or implied. In the present case the license to enter and use the elevator is implied, hence it would be asserted that there was an implied contract to enter. Here again the suggestion is to imply a contract for the purpose of raising a duty, when the law already imposes the duty without implication of a contractual relation. Moreover, the courts and systematic writers have not classed with contracts a mere permission to do or forbear the doing of an act, but have rather regarded such license as authority to do something that otherwise would be unlawfully done. Hence it cannot be in-
17 ferred that Congress by use of the term "implied contract" intended to include mere breaches of duty productive of injury to the licensee upon property of the Government.

The authorities collected by the several counsel are interesting and instructive as is the discussion of the case in the briefs presented. From these and other sources are gathered essential and simple

principles which govern the present issue and require that the demurrer should be sustained, with costs.

EDWARD B. THOMAS, *U. S. J.*

18 At a stated term of the circuit court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the borough of Brooklyn, city of New York, on the third day of November, 1900.

Present: The Honorable Edward B. Thomas, district judge holding the court.

WILLIAM SAMUEL BIGBY
*vs.*
THE UNITED STATES OF AMERICA.

A petition having been duly filed herein by William Samuel Bigby, petitioner herein, and a demurrer thereto having been served by George H. Pettit, United States attorney for the eastern district of New York, in behalf of the defendant herein, on the following grounds:

First. That it appears on the face of said petition that the court has no jurisdiction of the person of the defendant.

Second. That it appears on the face of the said petition that the court has no jurisdiction of the subject of the action.

Third. That it appears on the face of the said petition that said petitioner does not state facts sufficient to constitute a cause of action against the defendant.

And the said matter having come on regularly to be heard by the court, after hearing George H. Pettit, United States attorney, in behalf of the defendant, in support of the demurrer, and

19 Roger Foster, Esq., of counsel for the petitioner, in opposition thereto,

It is ordered that said demurrer be and is hereby sustained on all of the grounds aforesaid, and so far as it is sustained upon the ground that it does not state a cause of action, it is so sustained because such a cause of action as is stated in the petition is not authorized to be maintained against the United States by the Tucker act, namely chapter 359 of the Acts of the Second Session of the Forty-ninth Congress, approved March 3rd, 1887, and

It is further ordered that said petition be dismissed with costs to the defendant, and the clerk is hereby directed to enter final judgment herein in accordance therewith.

EDWARD B. THOMAS, *U. S. J.*

Endorsed: Order Filed and entered November 3, 1900.

20 Circuit Court of the United States for the Eastern District of New York.

WILLIAM SAMUEL BIGBY
vs.
THE UNITED STATES OF AMERICA. } Judgment.

A petition having been duly filed herein by William Samuel Bigby, petitioner herein, and a demurrer thereto having been served by George H. Pettit, United States attorney for the eastern district of New York, in behalf of the defendant herein, on the following grounds:

First. That it appears on the face of said petition that the court has no jurisdiction of the person of the defendant.

Second. That it appears on the face of the said petition that the court has no jurisdiction of the subject of the action.

Third. That it appears on the face of the said petition that said petition does not state facts sufficient to constitute a cause of action against the defendant.

And said cause having come regularly on to be heard by this court, at a stated term thereof, held in and for the eastern district of New York, in the Federal building, borough of Brooklyn, city of New York, on the nineteenth day of May, 1900, on the issues of law raised by said demurrer filed to said petition, and after hearing George H. Pettit, Esq., United States attorney, in behalf of the defendant, in support of said demurrer, and Roger Foster, Esq., of counsel for the petitioner, in opposition thereto, and an order
21 having been duly made and entered herein on the third day of November, 1900, sustaining the said demurrer, on all the grounds aforesaid, and directing that the said petition be dismissed with costs to the defendant, and that the clerk enter judgment herein in accordance with said order, and the costs herein having been adjusted by the clerk at twelve dollars and ninety cents ($12.90): Now, on motion of George H. Pettit, United States attorney, it is

Adjudged that the demurrer of The United States of America, the defendant herein, be, and the same is hereby, in all respects sustained, and it is further

Adjudged that the petition of the plaintiff herein be, and the same is hereby, dismissed, and that the defendant recover from the plaintiff herein the sum of twelve dollars and ninety cents ($12.90), costs as adjusted by the clerk, and that defendant herein have execution therefor.

Dated Brooklyn, Jan'y 30, 1901.

By the court,

B. LINCOLN BENEDICT, *Clerk.*

22 Circuit Court of the United States for the Eastern District of New York.

WILLIAM SAMUEL BIGBY
*against*
UNITED STATES OF AMERICA.

*Assignment of Errors.*

And now comes William Samuel Bigby, the above-named plaintiff, and who in connection with his petition for a writ of error, makes the following assignment of errors; and shows in the record and proceedings in the above-entitled suit, that there is manifest error in these amongst other things, to wit:

I. The court erred in the making and filing and entering of a decision herein which sustained the demurrer herein with costs.

II. The court erred in the making and filing and entering of an order which sustained the demurrer herein.

III. The court erred in the making and filing and entering of an order which dismissed the petition herein with costs.

IV. The court erred in the making and filing and entering of a judgment herein which sustained the demurrer.

V. The court erred in the making and filing and entering of a judgment herein which dismissed the petition herein with costs.

VI. The court erred in the making and filing and entering
23 of a decision, order and judgment herein which sustained the demurrer herein on the ground "that it appears on the face of said petition that the court has no jurisdiction of the person of the defendant."

VII. The court erred in the making and filing and entering of a decision, order and judgment herein which sustained the demurrer herein upon the ground "that it appears on the face of the said petition that the court has no jurisdiction of the subject of the action."

VIII. The court erred in the making and filing and entering of a decision, order and judgment herein which sustained the demurrer herein upon the ground "that it appears on the face of said petition that said petitioner does not state facts sufficient to constitute a cause of action against the defendant."

Wherefore the said William Samuel Bigby prays that the said decision, order and judgment be reversed, annulled and altogether held for nothing, and that he may be granted the relief prayed by him in his petition herein; and for such other and further relief in the premises as to the Supreme Court of the United States may seem just, together with his costs of this writ of error.

WILLIAM SAMUEL BIGBY, *Petitioner*,
By ROGER FOSTER,
*Attorney for Petitioner*, 35 *Wall St., New York.*

Endorsed: Assignment of error; filed May 13, 1901.

24 Circuit Court of the United States for the Eastern District of New York.

WILLIAM SAMUEL BIGBY
*against*
THE UNITED STATES OF AMERICA.

To the Honorable Edward B. Thomas, United States district judge:

The petition of William Samuel Bigby respectfully shows as follows:

I. Heretofore and on or about the 20th day of Nov. 1899, your petitioner William Samuel Bigby duly filed in circuit court of the United States for the eastern district of New York a petition against the United States of America in which your petitioner prayed for a judgment or decree against the United States of America upon the facts and law, for the sum of ten thousand ($10,000) dollars, together with his reasonable costs and disbursements; and on or about the 27th day of Nov. 1899, your petitioner duly filed an amended petition wherein he prayed for the same relief, On or about May 19th 1900, an order was duly made and entered herein amending the amended petition herein.

II. Subsequently, and on or about the 24th day of Jan. 1900, a demurrer to said petition was duly filed and served in behalf of the defendant therein, on the following grounds:

"First. That it appears on the face of said petition that
25 the court has no jurisdiction of the person of the defendant. Second. That it appears on the face of said petition that the court has no jurisdiction of the subject of the action. Third. That it appears on the face of said petition that said petitioner does not state facts sufficient to constitute a cause of action against the defendant."

III. On or about the 19th day of May 1900 the argument of the said demurrer duly came on to be heard before the Honorable Edward B. Thomas, United States district judge, who on or about Aug. 9th 1900 made and filed a decision sustaining said demurrer with costs; and who on or about the 3rd day of Nov. 1900 duly made and filed therein an order that the said demurrer be sustained on all of the grounds aforesaid and so far as it was sustained upon the ground that it did not show a cause of action, it was so sustained on the ground that such a cause of action as is stated in the petition is not authorized to be maintained against the United States by the Tucker act, namely chapter 359 of the Acts of the Second Session of the 49th Congress, approved March 3rd 1887; and it was thereby further ordered that the said petition be and it was thereby dismissed with costs to the defendant and on or about the 30th day of Jan. 1901 a final judgment was duly made and entered herein in accordance with said order.

IV. On or about the 31st day of Jan. 1901 by a certificate duly made and signed by said Honorable Edward B. Thomas the circuit

court of the United States for the eastern district of New
26 York thereby certified to the Supreme Court of the United States among other things that in this cause the jurisdiction of the said circuit court of the United States for the eastern district of New York is in issue; it thereby further certified to the Supreme Court of the United States said question of jurisdiction raised by said demurrer to the petition on the ground aforesaid, namely: the question whether a person who is not, and has not been, an employee of the United States, can sue the United States, in the circuit court of the United States in the district in which he resides to recover damages to the amount of ten thousand ($10,000) dollars which damages were caused by the personal injury received by said person through the negligence of an employee of the United States, which said person injured as aforesaid was being carried on an elevator in a public building owned and used by the United States as a post-office and for other governmental uses and purposes, when said persons entered said elevator for the purpose of visiting the office of the United States marshal of such district on official business.

V. Your petitioner conceives himself to be aggrieved by the decision and judgment herein in favor of this defendant and against this plaintiff in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of the plaintiff herein all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore your petitioner prays that a writ of error may
27 issue in his behalf to the United States circuit court for the eastern district of New York for the correction of errors so complained of, and a transcript of the record, proceeding, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States; and that your petitioner may have such other and further relief in the premises as may be just; and your petitioner will ever pray etc.

Dated, New York, May 2d 1901.

WILLIAM SAMUEL BIGBY, *Petitioner*,
By ROGER FOSTER,
*Attorney for Petitioner*, 35 *Wall St., New York.*

Allowed.

EDWARD B. THOMAS,
*U. S. District Judge, Holding the Circuit Court.*

Endorsed: Petition for writ of error, filed May 13, 1901.

28 Circuit Court of the United States for the Eastern District of New York.

WILLIAM SAMUEL BIGBY
*against*
THE UNITED STATES OF AMERICA.

Know all men by these presents, that we, William S. Bigby, as principal, residing at No. 31 De Kalb Ave., and Joseph Millward

Wade, as surety, residing at 32 Schermerhorn street, Brooklyn, N. Y., and Otto H. Huebel, as surety, residing at 93 Van Buren St., Brooklyn, N. Y., are held and firmly bound unto the defendant, The United States of America, in the full and just sum of two hundred and fifty ($250) dollars to be paid to said defendants; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this — day of February, 1901.

Whereas, lately at a circuit court of the United States for the eastern district of New York, in a suit depending in said court, between William Samuel Bigby, plaintiff, and The United States of America, defendant, an order was duly made and entered herein, on or about the 3d day of November, 1900, which ordered that the demurrer herein to the petition of the plaintiff be and it was
29 thereby sustained and that the said petition be and it was thereby dismissed with costs to the defendant herein; and

Whereas, on or about the thirtieth day of January, 1901, a judgment was made and entered herein in accordance with the aforesaid order; and

Whereas, the said William Samuel Bigby duly obtained a writ of error to reverse the said judgment and said order, and filed a copy thereof in the clerk's office of said court, and a citation having issued directed to the said The United States of America citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be holden at Washington, D. C., on the — day of ——

Now, the condition of the above obligation is such, that if the said William Samuel Bigby, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

JOSEPH M. WADE. [SEAL.]
OTTO H. HUEBEL. "
WILLIAM SAMUEL BIGBY. "

Sealed and delivered in presence of—
As to Joseph M. Weed,
JOHN C. RHODES.
JONATHAN HALL,
As to Otto H. Huebel.
EDWARD HARDING,
As to William Samuel Bigby.

30 STATE OF NEW YORK, }
*County of Kings, Eastern District of New York.* }

Joseph Millward Wade, being duly sworn, says: that he is a resident and householder within the State of New York, and worth twice the sum specified in the above bond, over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

JOSEPH M. WADE.

Sworn to before me this 3d day of April, 1901.

JOHN C. RHODES,
*Commissioner of Deeds, the City of New York,*
*Residing in the Borough of Brooklyn.*

STATE OF NEW YORK,
*County of Kings, Eastern District of New York,* } ss:

Otto H. Huebel, being duly sworn, says that he is a resident and a freeholder within the State of New York, and worth twice the sum specified in the above bond, over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

OTTO H. HUEBEL.

Sworn to before me this 16 day of April, 1901.

JONATHAN HALL,
[L. S.] *Notary Public, Kings Co., N. Y.*, 135.

STATE OF NEW YORK,
*County of Kings.*

On this 3d day of April, 1901, before me personally appeared Joseph M. Wade, to me known and known to me to be the individual in and who executed the foregoing instrument, and who acknowledged to me that he executed the same.

JOHN C. RHODES,
*Commissioner of Deeds, the City of New York,*
*Residing in the Borough of Brooklyn.*

31 STATE OF NEW YORK,
*County of Kings.*

On this day 16th of April, 1901, before me personally appeared Otto H. Huebel, to me known and known to me to be the individual in and who executed the foregoing instrument, and who acknowledged to me that he executed the same.

JONATHAN HALL,
[L. S.] 135, *Notary Public, Kings County, N. Y.*

STATE OF NEW YORK,
*County of Kings,* } ss:

On this 26th day of April, 1901, before me personally appeared Joseph Millward Wade, to me known and known to me to be the individual who executed the foregoing instrument, and he thereupon acknowledged to me that he executed the same.

H. H. TAYLOR,
[L. S.] *Notary Public, Kings Co., N. Y.*, 81.

STATE OF NEW YORK,
*County of Kings, Eastern District of New York.* }

Joseph Millward Wade being duly sworn says that he is a resident and a householder within the State of New York, and worth twice the sum specified in the above bond, over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

JOSEPH MILLWARD WADE.

Sworn to before me this 26th day of April, 1901.

H. H. TAYLOR,
[L. S.] *Notary Public, Kings Co., N. Y.*, 81.

32 STATE OF NEW YORK,
*County of New York,* } *ss:*

On the 27th day of April, 1901, before me personally came William Samuel Bigby to me known and known to me to be the individual who executed the foregoing instrument, and who acknowledged to me that he executed the same.

EDWARD HARDING,
[L. S.] *Notary Public, New York County.*

The within bond is approved.

EDWARD B. THOMAS,
*U. S. District Judge, Holding the Circuit Court.*

Endorsed: Bond for costs on writ of error, filed May 13th, 1901.

33 UNITED STATES OF AMERICA,
*Eastern District of New York,* } *ss:*

I, B. Lincoln Benedict, clerk of the circuit court of the United States for the eastern district of New York, do hereby certify that the foregoing is a true transcript of the amended petition, notice, affidavits, appearance, demurrer, orders, opinion, judgment and appeal papers, made up to be transmitted, on writ of error of the plaintiff to the Supreme Court of the United States, in the suit of William Samuel Bigby, plaintiff, *versus* The United States of America, defendant.

In witness whereof I have hereunto set my hand and the seal of this court, the 29 day of May, 1901.

[The Seal of the Circuit Court, Eastern District of New York.]

B. LINCOLN BENEDICT, *Clerk.*

34 Circuit Court of the United States for the Eastern District of New York.

WILLIAM SAMUEL BIGBY
*vs.*
THE UNITED STATES OF AMERICA. } Certificate.

The circuit court of the United States for the eastern district of New York hereby certifies to the Supreme Court of the United States that on the thirtieth day of January, 1901, a judgment was entered in the above-entitled action, pursuant to the decision of said court sustaining a demurrer filed by the defendant, The United States of America, to the petition of the petitioner, William Samuel Bigby, on all the grounds specified in said demurrer, namely:

(1.) That it appears upon the face of the petition that the court has no jurisdiction of the person of the defendant.

(2.) That it appears upon the face of the petition that the court has no jurisdiction of the subject of the action.

(3.) That it appears upon the face of the petition that it does not state facts sufficient to constitute a cause of action against the defendant,

a copy of which petition and demurrer is contained in the judgment-roll filed herein, to which reference is had for a more paticular description thereof.

And this court further certifies that in said cause the jurisdiction of this court is in issue, and further certifies to the Supreme
35 Court of the United States said question of jurisdiction raised by said demurrer to the petition on the grounds aforesaid, namely: The question whether a person who is not, and has not been, an employee of the United States, can sue the United States, in the circuit court of the United States, in the district where he resides, to recover damages to the amount of ten thousand ($10,000) dollars, which damages were caused by personal injury received by said person through the negligence of an employee of the United States, while said person injured as aforesaid, was being carried on an elevator in a public building, owned and used by the United States as a post-office and for other governmental uses and purposes, when said person entered said elevator for the purpose of visiting the office of the United States marshal of such district on official business.

Dated Brooklyn, Jan'y 31, 1901.

[The Seal of the Circuit Court, Eastern District of New York.]

EDWARD B. THOMAS,
*United States Judge.*

36 [Endorsed:] United States circuit court, eastern district of New York. William Samuel Bigby *vs.* United States. Certificate. Original. George H. Pettit, United States attorney for the defendant, Federal building, borough of Brooklyn.

37 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of New York and to the circuit court of the United States for the eastern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the decision and judgment which is in the said circuit court, before you, between William Samuel Bigby, plaintiff, and United States of America, defendant, a manifest error has happened, to the great damage of the said William Samuel Bigby, as by his complaint and his assignment of errors appears, we being willing that the errors, if any have been, should be duly corrected, and full and speedy justice done to the said William Samuel Bigby plaintiff, in his behalf, do command you, if judgment be therein given that under your seal, distinctly and openly, you send the record and proceedings and decision and judgment and papers, with all things concerning the same, duly authenticated, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, District of Columbia, on the 12 day of June next, in the said Supreme Court, to be then and there held, that the record and proceedings and decision and judgment aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 13th day of May in the year of our Lord 1901.

B. LINCOLN BENEDICT, *Clerk.*

Allowed by

EDWARD B. THOMAS,
*United States District Judge, Holding the Circuit Court.*

38 [Endorsed:] 6/147 Circuit court of the United States eastern district of New York William Samuel Bigby against The United States of America Writ of error Roger Foster, plaintiff's attorney, 35 Wall street, New York. Received and filed May 13th 1901.

39 THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the 12 day of June next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of New York, wherein William Samuel Bigby is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the borough of Brooklyn, city of New York, this 13th day of May, 1901.

EDWARD B. THOMAS,
*United States District Judge, Holding the Circuit Court of the United States for the Eastern District of New York.*

40 [Endorsed:] 6/147 Circuit court of the United States for the eastern district of New York William Samuel Bigby plaintiff in error against United States of America, defendant in error Citation Roger Foster, plaintiff's attorney, 35 Wall street, New York. Received and filed May 13th 1901.

41 [Endorsed:] Supreme Court of the United States William Samuel Bigby plaintiff in error *vs.* The United States of America defendant in error Record Roger Foster attorney for plaintiff in error George H. Pettit U. S. attorney and attorney for defendant in error. Writ of error from the circuit court of the United States for the eastern district of New York.

Endorsed on cover: File No. 18,191. E. New York C. C. U. S. Term No. 111. William Samuel Bigby, plaintiff in error, *vs.* The United States. Filed June 1, 1901.

14585

No. 111.

Brief of Foster for P. C.

Office Supreme Court U.S.
FILED
NOV 14 1902
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

Filed Nov. 14, 1902.

WILLIAM SAMUEL BIGBY,
Plaintiff in Error,

AGAINST

THE UNITED STATES OF AMERICA,
Defendants in Error.

111

## BRIEF FOR PLAINTIFF IN ERROR.

### Statement.

This is a writ of error to a judgment of the Circuit Court of the United States for the Eastern District of New York sustaining a demurrer to a petition to recover a claim against the United States under the Tucker Act of March 3, 1887.

### Plaintiff's Brief in Opposition to Demurrer.

The petition sets forth the cause of action as follows:

"III. On or about November 27th, 1893, your "petitioner at the request of the said United States "of America and at the request of the officers, em- "ployees and duly authorized agents of the said "United States of America, each of which officers,

" agents and employees was acting within the scope of " his authority, entered into a passenger elevator in " the United States Court House and Post Office " Building in said Borough of Brooklyn, which said " building and elevator were then owned and con- " trolled by the United States of America, and which " elevator was designed and intended by the said " United States of America for the use of persons on " their way to the office of the Marshall of the United " States for the Eastern District of New York; which " entry was made by our petitioner while on his way " to said Marshall's office upon official business."

" IV. The United States of America then and there " entered into an implied contract with your petitioner " wherein and whereby for a sufficient valuable con- " sideration it agreed to carry your petitioner safely; " to operate said elevator with due care; and to em- " ploy for the purposes of the operation of said ele- " vator a competent and experienced person.

" V. In violation of said contract said United States " of America failed to carry your petitioner safely; " and failed to operate said elevator with due care; " and failed to employ for the operation of said ele- " vator and to put in charge of the same a competent " and experienced person; and violated its said con- " tract with your petititioner in other ways.

" VI. In consequence of the failure of the United " States and of its employees in charge of said ele- " vator to carry your petitioner safely and to operate " said elevator with due care; and in consequence of " the failure of the United States to employ a compe- " tent and experienced person to operate said elevator; " and in consequence of the incompetence and inex- " perience of the person then engaged in operating said " elevator and in charge of the same, and in conse- " quence of the said violation by the United States of " its said contract your petitioner while entering the " said elevator without negligence on his part was " caused to fall and his foot, ankle and leg were crushed " between said elevator and the top of the entrance into

" the elevator shaft or a projection in the shaft of said " elevator or in some other manner and the back of " your petitioner and other parts of the body of your " petitioner were also consequently injured and your " petitioner consequently suffered a laceration of the " ligaments of his ankle and he consequently was " caused much bodily and mental pain."

The damages claimed were $10,000 (2, 3, 5). The Court sustained the demurrer on the ground of want of jurisdiction of the person of the defendant, want of jurisdiction of the subject of the action, and because the facts alleged did not constitute a cause of action (8, 9). An examination of the opinion shows that these are three statements of the same objection, namely—that the case did not fall within the provisions of the Tucker Act (8). The Circuit Court consequently certified to this Court the question of jurisdiction, namely—" The question whether a person who is not, " and has not been, an employee of the United States, " can sue the United States in the Circuit Court of " the United States, in the district where he resides, " to recover damages to the amount of $10,000.00, " which damages were caused by personal " injury received by said person through the " negligence of an employee of the United States, " while said person injured as aforesaid was being " carried on an elevator in a public building owned " and used by the United States as a post-office and " for other governmental uses and purposes when " said person entered said elevator for the purpose of " visiting the office of the United States marshal of " such district on official business (16)."

The petition for the writ of error set forth this question of jurisdion and the two other grounds raised in the demurrer (11, 12, 26). The allowance of the writ of error (17, 37) upon this petition was in itself a sufficient certification of the question of jurisdiction.

Excelsior Pipe Co. vs. Pacific Bridge Co., 185 U. S., 282.

In accordance with the rules of this Court, we insert the

## Assignment of Errors.

I. The Court erred in the making and filing and entering of a decision herein which sustained the demurrer herein, with costs.

II. The Court erred in the making and filing and entering of an order which sustained the demurrer herein.

III. The Court erred in the making, filing and entering of an order which dismissed the petition herein, with costs.

IV. The Court erred in the making and filing and entering of a judgment herein which sustained the demurrer.

V. The Court erred in the making and filing and entering of a judgment herein which dismissed the petition herein, with costs.

VI. The Court erred in the making and filing and entering of a decision, order and judgment herein which sustained the demurrer herein on the ground "that it appears on the face of the said petition that the Court has no jurisdiction of the person of the defendant."

VII. The Court erred in the making and filing and entering of a decision, order and judgment herein which sustained the demurrer herein upon the ground "that it appears on the face of the said petition that the Court has no jurisdiction of the subject of the action."

VIII. The Court erred in the making and filing and entering of a decision, order and judgment herein which sustained the demurrer herein upon the ground

"that it appears on the face of said petition that said petitioner does not state facts sufficient to constitute a cause of action against the defendant" (p. 10).

## Statute.

The cause of action is founded upon the Tucker Act of March, 1887 (24 St. at L., 505); which provides:

"That the Court of Claims shall have jurisdiction "to hear and determine the following matters:

"FIRST. All claims founded upon the Constitution "of the United States or any law of Congress, except "for pensions, or upon any regulation of an Executive "Department or *upon any contract, expressed or implied*, with the Government of the United States, or "for damages, liquidated or unliquidated, in cases not "sounding in tort, in respect of which claims the "party would be entitled to redress against the "United States either in a court of law, equity, or admiralty, if the United States were suable; Provided, "however, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims "growing out of the late civil war, and commonly "known as 'war claims,' or to hear and determine "other claims which have heretofore been rejected or "reported on adversely by any court, Department or "commission authorized to hear and determine the "same."

* * * * * *

"That the district courts of the United States shall "have concurrent jurisdiction with the Court of Claims "as to all matters named in the preceding section "where the amount of the claim does not exceed one "thousand dollars, and the circuit courts of the United "States shall have such concurrent jurisdiction in all "cases where the amount of such claim exceeds one "thousand dollars and does not exceed ten thousand "dollars."

## I.

## THE PETITIONER HAD THE RIGHT TO WAIVE ANY REMEDY THAT HE MIGHT HAVE IN TORT FOR THE NEGLIGENCE OF THE UNITED STATES AND TO SUE UPON THE IMPLIED CONTRACT OF THE GOVERNMENT TO EXERCISE CARE IN CARRYING HIM IN THE ELEVATOR.

1. *It is well settled, that when a carrier, common or special, or any other bailee injures by the negligence of the bailee or of his servants a person or a chattel which has been entrusted to his care, the injured party may waive the tort and sue in contract for damages.*

Usually at the present time the plaintiff sues in tort for the reason that the remedy in such an action is more beneficial to him. But even in such a case the action is described as *ex delicto quasi ex contractu.* The remedy in contract is now concurrent with that in tort; and anciently no such suit could be brought without an allegation of assumpsit.

Mosley vs. Fosset, Moore, 543, fol. 72*b*; s. c. 1 Roll. Abr., 4, pl. 5, (4 Eliz., rot. 183); was an action in case for the loss of a gelding delivered to defendant for safe keeping. "*Mes touts agree que* "*sans tiel special assumpsit l'action ne gist.*" "All "agreed that without such a special *assumpsit* the "action would not lie."

In Pollard vs. Railroad Co., 101 U. S., 223, this Court held that an action in assumpsit was properly brought by husband and wife on a contract by a carrier of passengers to carry the wife safely; although an action in tort would also lie for the same injury.

Philadelphia and Reading R. R. Cc. vs. Derby, 14 14 Howard, 468, 485, per Mr. Justice GRIER, : "a "traveller by stage coach or other public conveyance "who is injured by the negligence of the driver has an

" action against the owner founded on his contract to " carry him safely."

N. J. Steamboat Co. vs. Brockett, 121 U. S., 637, 645, per Mr. Justice HARLAN, speaking "of the con- " tract for safe transportation " : " The plaintiff was " entitled, in virtue of that contract, to protection " against the misconduct or negligence of the carrier's " servants."

Boylan vs. Hot Springs R. R. Co., 132 U. S., 146, 151, was an action in assumpsit for a breach of the implied contract by the carrier to protect its passengers against assaults by its agents. Mr. Justice GRAY said : " This action of assumpsit sounding in a contract *only* " and not in tort."

In Kansas Pacific Ry. Co. vs. Kunkel, 17 Kansas, 145, 166, the action was brought for breach of a contract of carriage, through the defendant's suddenly starting its train while the plaintiff was alighting therefrom ; and in consequence throwing him from the carriage to the ground, wounding, bruising and beating him, so that he suffered a rupture as well as other bodily injuries. The accident happened August 17, 1869. This action was brought in May, 1872. The defendant claimed that it was an action for damages for negligence, and consequently barred because not brought within two years as prescribed by Section 12 of the Kansas Code of Civil Procedure. The plaintiff claimed, however, and the Court *held :* that the suit was properly brought as " an action upon a contract not in writing, express or implied ;" and that consequently the three years' statute of limitation applied. Mr. Justice BREWER said :

" A second position of counsel is, that the cause of " action is not one arising from contract, but is founded " upon tort, and that therefore it was barred any way, " even if August instead of March was the time of the " injury. This claim cannot be sustained. While the " distinction between actions on contract and those for " tort is plain and broad, yet, as is well said in the " case of Staley vs. Jameson, 46 Ind., 159, on which

" counsel mainly rely, and in which is quite a full dis-
" cussion of the question, it is not always easy to de-
" termine from the allegations of the petition in which
" class the action must be placed; for contracts are
" often alleged in actions which clearly sound in tort,
" and as often tortious acts and conduct of the defend-
" ant are averred in actions purely *ex contractu*. And
" often the plaintiff has his election upon the same
" state of facts, whether to bring an action *ex con-*
" *tractu*, or on *ex delicto*. Here the pleader alleges that
" the defendant was a common carrier, that it made
" a certain contract of carriage, and received its pay
" therefor, and then alleges that defendant broke said
" contract, and how it broke it. True, in showing how
" defendant broke the contract it discloses wrongful
" acts done by defendant; but still the manifest gist
" of the action is the breach of the contract, and the
" tortious acts are simply the manner of the breach.
" The case was tried in the district court upon the
" theory that it was an action *ex contractu*, and the
" first briefs of the learned counsel were prepared upon
" the same understanding; and this was correct."

In Pennsylvania R. R. Co. vs. Peoples, 31 Ohio St., 537, 543, it was *held* that a railroad company was liable to attachment in an action by a would-be passenger for a personal injury while stepping upon the train, and that the action was one in contract.

BOYNTON, J.: " *When a person undertakes any office,*
" *employment, trust or duty, he thereby, in contempla-*
" *tion of law, impliedly contracts with those who employ*
" *him to perform that with which he is entrusted, with*
" *integrity, diligence and skill;* and, if he fails to do
" so, it is a breach of contract for which a party may
" have his remedy, in most cases, by action of as-
" sumpsit, as well as by action on the case. Corbett
" v. Packington, 6 B. & C., 268. *In 2 Greenleaf's*
" *Evidence, § 208*, the author, in speaking of the duties
" and liabilities of common carriers, whether by land
" or water, says: ' The action against a carrier, in any
" ' of these modes, is usually in assumpsit upon the

" ' contract.' While the form of the action does not " materially affect or vary the character of the evi- " dence necessary to establish the liability of the car- " rier, there is no doubt that the cause of action in the " present case arises upon contract within the meaning " of the above provision of the code."

The same rule applies to an action against a carrier for negligence which has caused injury to goods in his custody.

In Queen of the Pacific, 61 Fed. Rep., 213, 216–217, Judge MORROW said: "The counsel for claimant fur- " ther contends that the libels should have been " counted on a tort and not on a contract. The libel- " ants had the election to sue upon contract or tort. " They could stand upon the contracts of affreight- " ment, or they might waive their right to sue on the " contracts, and sue in tort. The contention of coun- " sel for claimant that, as the libelants are suing for " damages to the merchandise described in the bills of " lading or shipping receipts alleged to have been " occasioned by the negligence of the officers and crew " of the 'Queen of the Pacific,' the cause of the action " is tort and not contract, is not well founded."

Central Vermont Co. vs. Soper C. C. A., 59 Fed. Rep., 879, 887, per PUTNAM, J. (COLT and NELSON, JJ., concurred):

" Under the Massachusetts practice acts, the plaint- " iffs below combined in the declaration two classes of " counts—one on the bills of lading, or on the agree- " ments contained in them, taking the place of assump- " sit at common law, and the other in tort, based on " the common law liability of carriers and warehouse- " men, and corresponding to the common-law action on " the case for negligence. An objection was taken by " the bill of exceptions that counts of the latter class " are not sustainable. But the common law permitted " actions against carriers and warehousemen for the loss " of merchandise actually delivered into their posses- " sion to be brought either in assumpsit, or in case for " negligence, at the option of the owner of the mer-

" chandise. This is so clearly settled that it needs no " explanation here."

To the same effect are

Cooper vs. Berry, 21 Georgia, 526.
Hunt vs. Norris, 4 Martin, La. (O. S), 517, quoted *infra* at page 9 of this brief.
Orange Bank vs. Brown, 3 Wend., 158, 162, citing Jeremy on the Law of Carriers, p. 117; Chitty's Pleadings, Vol. I., 75, 6; Vol. II., 117, 271, 2.

Pomeroy on Remedies, § 568: " The single prin- " ciple upon which the entire doctrine rests is very " simple, and should—and would, if the courts were " always consistent in acting upon it,—afford a " ready and plain solution of every question, new or " old, which can be suggested. This single principle " may be thus formulated. From certain acts or omis- " sions of a party creating a liability to make compen- " sation in damages, the law implies a promise to pay " such compensation. Whenever this is so, and the " acts or omissions are at the same time tortious, the " two-fold aspect of the single liability at once follows, " and the injured party may treat it as arising from " the tort and enforce it by an action setting forth the " tortious acts or defaults, or may treat it as arising " from an implied contract and enforce by an action " setting forth the facts from which the promise is in- " ferred by the law."

*Ibid*, Section 570:

" It is a familiar rule that the action against a com- " mon carrier for a loss or injury of goods may either " be in tort for the violation of his general duty or on the " contract which he expressly or *impliedly* enters into. " The owner has his election which of these remedies " he will pursue."

Citing many cases.

*Ibid*, § 571: " Whenever the promise will be implied, " if the acts or omissions from which it is inferred are " at the same time tortious, the election to sue for the

" tort or for a breach of the contract must necessarily " exist or else it must be denied on some mere arbi- " trary and insufficient ground."

*Ibid*, § 573 : "The allegation of scienter is indispen- " sable in the action *ex delicto* based upon such a lia- " bility and distinguishes it in a marked manner from " the correlative action based upon an implied " promise."

Addison on Torts, Wood's Ed. :

§ 16, p. 17, speaking of this class of cases when brought in tort : "In the form of pleading they re- " sembled an ordinary tort ; but in their essence they " were breaches of contract and not tort. An instance " may be found in the case of an action against a com- " mon carrier of goods entrusted to him to carry. " * * * It is manifest, however, that in the case " supposed the duty does in fact arise out of an unex- " pressed contract, that is out of a concurrence of in- " tention in both the sender and the carrier that the " latter shall carry the goods for the former and indeed " a declaration alleging that in consideration that the " sender would deliver the goods to the carrier to be " carried for him, the carrier promises to carry them " safely was always held to be established by proof of " a delivery of the goods to the carrier to be carried. " The fact that the same cause of action could thus be " stated in two different ways, and that in one case it " was called an action of tort and in the other an ac- " tion of contract, led to some confusion as to the real " nature of the action."

It was held in an action against a livery stable keeper for negligence in allowing a horse in his care to be kicked by another horse in his stable was "founded in contract" and not in tort.

Legge vs. Tucker, 1 H. & N., 500,

and that so was an action against a cab driver for negligence in carrying a passenger's baggage.

Baylis vs. Lintott, L. R., 8 C. P., 345.

Fleming vs. Manchester, Sheffield & Lincolnshire Ry. Co., 4 Q. B. D., 81.

HEADNOTE: "The claimant alleged that the plaintiff "cause to be delivered to the defendants, as common "carriers for hire a parcel of goods to be carried from "S. to D. for reward to the defendants, but that the "defendants did not safely and securely carry and de- "liver the same, but so carelessly conducted them- "selves that it was lost * * * *Held*, that the ac- "tion was founded on contract within the meaning of "the County Courts Act."

BRAMWELL, BAGGALLEY and THESIGER, JJ.

2. *The doctrine applies to all carriers of goods or persons, and to all other bailees, whether or not there has been any undertaking upon their part, and although they do not receive compensation.*

Foulks vs. Metropolitan District Ry. Co., L. R., 4 C. P. D., 267, 281, 282, per LOPES, J. (see, also, GROVE, J., at 276, 277), the passenger had taken a ticket from one railway company and was injured in the car of another, to which he was transferred, "I think that "according to the authorities the passenger could "sue either railway A or railway B. He could "sue railway A on the contract arising from the "ticket issued by the company to carry him the "whole distance with reasonable care or caution, or "he could sue railway B as the immediate authors of "the negligence, on *the implied contract or undertaking* "*which would arise from his having been received into* "*the carriage, or from his having been invited to go into* "*the carriage of railway B and become a passenger on the* "*railway.*"

Metcalf on Contracts, 2d Ed., 5, 6:

"If a man undertakes any trust, office or employ- "ment the law raises a promise on his part to perform "his undertaking with integrity, diligence and skill; "and if he injures his employee by a want of either of "these qualties he is liable to an action on his implied "contract for reparation" (citing 1 Comyn on Contracts, 1st Ed., 6.

Warbrooke vs. Griffin, 2 Brownl., 254 ; s. c., MOORE, 876, 877 :

"It is an implied promise of every part, this is of "the part of the innkeeper, that he will preserve the "goods of his guest, and of the part of the guest that "he will pay all duties and charges which he caused "in the house."

Coggs vs. Bernard Lord RAYMOND, 909, 919, per HOLT, J :

"The owner's trusting him with the goods is a suffi- "cient consideration to oblige him to a careful man- "agement. * * * A bare being trusted with an- "other man's goods must be taken to be a sufficient "consideration if the bailee once enter upon the trust "and take the goods into his possession."

Beauchamp vs. Powley, 1 M. & Rob., 38.
Doorman vs. Jenkins, 2 A. & E., 256.

Dalstown vs. Janson, 5 Mod., 90, 92; s. c., Lord RAYMOND, 58 :

"An action against a common carrier upon the "custom of England is not so much upon a tort as "upon a contract."

Symons vs. Darkroll, Palmer, 523, HYDE, C. J. : "Delivery *fait le* contract ;" although the declaration did not allege that the defendant was a *common* carrier.

In Boson vs. Sandford, 1 Shower, 29; s. c., 1 Show, 101 ; s. c., 2 Show, 478; s. c., 3 Mod., 321 ; s. c., 2 Salk, 440 : the declaration alleged that the plaintiff had laden on board the defendants' ship divers goods to be carried from London to Topham for a reasonable freight ; that the defendants received the said goods, "and them to transfer and carry in form afore- "said did undertake ;" but that the defendants so negligently carried the same that they were spoiled. All the judges agreed that the action was upon an implied contract, which was entered into by all the owners of the ship, and that the failure to make some of them defendants was fatal to the suit. Chief

Justice HOLT said: "*This action is grounded upon the "trust, and that doth imply a contract.* In all cases "where the action is grounded on a contract, all that "are privies to the contract shall take advantage of "this omission on the general issue."

In Hunt vs. Norris, 4 Martin (O. S.) La., 517, 530, 531, it was held that an attachment would lie against a common carrier for damages to goods shipped upon the defendant's line, under a statute which only authorized attachments in actions for debt. MATTHEWS, J.:

"Obligations, arising from implication of law, are "equally binding with those, created by an express "agreement. Whether the obligation of a common "carrier to indemnify a person, who has intrusted him "with goods, which are lost by the negligence of the "former, be one, growing out of an express or implied "contract, may be doubted; but, admitting its origin "to be from implication, the indemnity due is not less "a debt. *In 2 Blacks, 464*, where the author treats of "the action of debt, it is stated that in a bailment, 'if "the bailee loses or detains a sum of money bailed to "him, for a specific purpose, he becomes indebted to "the bailor, upon the same numerical sum upon his "implied contract.' Here we see a debt may be "created by implication in a contract of bailment, "when the thing bailed is money. In express con-"tracts, we have seen that a promise to deliver any "property or goods, specified in the agreement, makes "the promisor debtor to the promisee for these goods; "and the things promised constitute a debt. The "obligations arising from implied contracts are equally "binding on the obligor, as those arising from express "contracts; therefore, the bailee of goods who loses "or detains them improperly, becomes indebted to the "bailor for those goods."

In Brown vs. Boorman, 11 Cl. & Fin., 1, 44,

Lords CAMPBELL, BROUGHAM and COTTENHAM concurring, held that the duties of a bailee rise out of a contract.

(3) *Calling the permission to use the elevator a license does not prevent the transaction from becoming a contract as soon as the licensee has acted upon the license.*

Mumford vs. Whitney, 15 Wendell, 380, 387, per SAVAGE, C. J.:

"A license to enter upon land * * * is sub-
"stantially a promise."

The license in the case at bar was not implied, as the learned District Judge seems to have thought (7). The petition expressly alleges that Mr. Bigby entered the elevator at the request of an officer and agent of the United States (2).

(4) *The operator of a passenger elevator is a carrier and is governed by the same principles of law that apply to other carriers.*

He carries passengers in a car upon wheels that operates vertically. There is no difference in principle between a common carrier and other carriers so far as the question under discussion is concerned.

The liability of the owner and operator of an elevator for passengers, after he has received a passenger for transportation, is similar to that of a common carrier of passengers.

In Marker vs. Mitchell, 54 Fed. Rep., 637, 638, Judge TAFT said: "The theory of the court was that
"the liability of Mitchell in the running of a passenger
"elevator was the same as that of a common carrier,
"and the standard for a common carrier is the high-
"est degree of care which human foresight can sug-
"gest. This view is sustained by the case of Good-
"sell v. Taylor, a decision of the supreme court of
"Minnesota, reported in 42 N. W. Rep., 873, and by
"the case of Treadwell v. Whittier, a decision of the
"supreme court of California, reported in 22 Pac.
"Rep., 266 [80 Cal., 574, 585]. It is contended that
"such a rule applies to the machinery used, but does
"not apply to the conduct of the employees of a com-

" mon carrier. No case has been cited which makes " this distinction."

## II.

## THIS IS NOT AN ACTION " SOUNDING IN " TORT."

As has been shown, the plaintiff had an election whether to sue in tort or in contract, and he had chosen the latter form of action. The nature of the suit is not tortious, but contractual (see Addison on Contracts, quoted, *supra*, on p. 11 of this Brief). Originally, a suit could only have been brought where a contract was expressly alleged. The permission to sue in tort, without reference to the contract, is a modern extension of the rule given in favor of the plaintiff, and is not one that should be used to his disadvantage.

Even in such a case the action is not one purely in tort, but one *ex delicto quasi ex contractu.*

Moreover, the statute does not except cases " grounded in tort," but only cases " sounding in " tort." There is a manifest distinction between the phrase " sounding in tort " and " grounded in tort." That this is so is clear from the cases of quasi contracts, founded upon purely tortious acts, where the United States has been held liable, as shown in the next point (pp. 17 and 18). The word " sounding " refers to the form of the pleading ; that is, the way it sounds when read. We need cite but a single quotation to illustrate the meaning of the phrase—namely, that from the opinion of Mr. Justice GRAY, in Boylan vs. Hot Springs R. R. Co., 132 U. S., 146, 151 (quoted, *supra*, p. 7 of this Brief). The present case sounds in tort and is grounded in tort.

## III.

### THE STATUTE IN QUESTION HAS ALWAYS BEEN CONSTRUED WITH THE UTMOST LIBERALITY BY THE COURTS.

It has been held, to authorize a suit against the Government, not only upon facts analagous to those here where a contract was implied from the intention of the parties without the use of any express language to that effect; but also when there was no intention or idea in the minds of any of them that a contract should be made, yet, because of the "unjust enrichment" of the defendant, by a legal fiction an implied contract was adjudicated to exist where an action for money had and received would have lain at common law. These cases the modern science of jurisprudence classifies not as implied contracts, but as quasi-contracts; yet notwithstanding this they have been held to fall within the statute.

In U. S. vs. State National Bank, 96 U. S., 30, it was *held* that the United States was liable to the plaintiff for money obtained in the Government for fraud of one of its agents. This Court said through Mr. Justice SWAYNE (p. 36):

"But surely it ought to require neither argument "nor authority to support the proposition, that, where "the money or property of an innocent person has "gone into the coffers of the nation by means of any "fraud to which its agent was a party, such money or "property cannot be held by the United States against "the claim of the wronged and injured party."

"The United States must use due diligence to charge "the indorsers of a bill of exchange, and they are liable "to damages if they allow one which they have ac- "cepted to go to protest (U. S. v. Barker, 12 Wheat., "560; Bk. v. U. S., 2 How., 711; U. S. v. Bk., 15 "Pet., 377)."

In Swift Co. vs. U. S., 111 U. S., 22 : It was held that a suit will lie against the United States to recover money illegally extorted by a Government officer.

In Bryan vs. U. S., 6 Ct. Claims, 128, and McGowan vs. U. S., 20 Ct. Cl., 147 : that the United States are liable for salvage services rendered to their ships.

The United States have often been held liable for the negligence of their officers.

In Bostwick vs. U. S., 94 U. S., 53, it was held that the United States were liable for damage caused to property " from the want of reasonable care in the " use " of the same ; and for the voluntary waste of the same by their officers who occupied it as a hospital and camp under a lease made by the plaintiff to the general in command.

In Collins & Farrell vs. U. S., 34 Ct. Cl., 294 : The United States had contracted to furnish a copper dam for the use of the plaintiffs. *Held* that the Government was liable for damages caused by the negligence of its employees in constructing the copper dam so that it leaked, although the contract for the construction of the dam did not say that there should be such a liability.

On the other hand, in Hayward vs. U. S., 30 Ct. of Claims, 219, it was *held* that the United States were not liable for damage to land adjoining Government works because of the negligent construction of a dam upon Government lands. The reason assigned for that decision was that there was no implied contract to protect the adjoining landowner.

The distinction between cases in which the Government is liable and those in which it is not is clear. Where a man uses a Government building by its permission, there is an implied contract that the Government and its employees shall not be negligent. There is no such contract in the case of the owner of land in the vicinity of a public building. The liability for an injury in such a case is purely tortious. It is an application of the maxim, *sic utere trio ut alieno non laedas.* In cases of pure tort the Government is not

liable; but where a contract can be reasonably or even artificially implied a liability on the part of the United States exists.

The liablility of the Government to make reparation in cases of this character has been recognized in Belgium. Pasicrisie B. 1852 pp. 1-370

See, also, Gerveis de Clifton's Case, Y. B. 22 Ed. 3, f. 5 pl. 12.

In Gibney vs. State of New York, 137 N. Y., 1, *held* that the State of New York was liable in damages for negligence of its employees in leaving unguarded an opening in the railing of a bridge, in consequence of which a person crossing the bridge was injured.

The United States have acknowledged the justice of similar claims.

After the fall of Ford's Theatre, Congress decided that "in equity and justice the Government should compensate the sufferers of that disaster" who were government clerks employed there, "for the injuries sustained by them"; and after a hearing before a joint commission appropriated considerable sums of money for that purpose.

28 St. at L. 397.
28 St. at L. 92.
30 St. at L. 109.

The construction of the law for which we contend will not greatly increase the number of claims against the Government. It will not make it liable for damages caused to property or persons not on Government land. It will leave the officers of the army still untrammelled in the seizure or destruction of property because of military necessity. It will impose no liability for collisions caused by the negligence of men-of-war or even of revenue cutters. It does not seek to bring within the act breaches of duties to the whole world which the law imposes upon all men, but merely the violations of the obligations to particular individuals which all persons assume by undertaking to

perform a service for them or by inviting them upon their land.

There is no reason why the statute should not be given a liberal construction and applied to the case at bar. Every consideration of public policy requires that the life and body of the citizen should have the same protection that is given to his property. Property is not more sacred than human life. In a case of this sort, where, as usual, the servant is irresponsible, there would otherwise be no remedy, for the postmaster is relieved from liability, since his subordinate is not his agent.

## IV.

## THE COURT HAS JURISDICTION OF THIS APPEAL.

The petition was dismissed for want of jurisdiction, and at the same term the trial Judge duly certified the question of jurisdiction (p. 16).

This establishes the jurisdiction of this Court to entertain the appeal.

> Evarts Act, of March 3, § 5, 1891, 26 St., at L., p. 827.
> U. S. vs. Jahn, 155, U. S., 109, 114, 115, per Mr. Chief Justice FULLER.

The fact that, after deciding that he had no jurisdiction, the Judge said, that the petition did not state a cause of action, does not affect this appeal. His opinion shows that he intended to hold, not that there was a defect in pleading, nor that the facts stated would not constitue a good cause of action against anyone who had operated the elevator, except the Government; but only that the petition did not state a case under the Tucker Act; because he thought that the suit was not in contract, but

sounded in tort. That was a question of jurisdiction, namely, whether the Court had jurisdiction over the United States, and whether the suit arose under a statute of the United States.

Blackburn vs. Portland, Gold Min. Co., 175 U. S., 571.

See, also,

Wetmore vs. Rymer, 169 U. S., 115.
Sheppard vs. Adams, 168 U. S., 618.
Powers vs. Chesapeake & Ohio Ry. Co., 169 U. S., 92.
The Annie Faxon (C. C. A.), 87. Fed. R., 961.
Shields vs. Coleman, 157 U. S., 168.
Huntington vs. Laidley, 176 U. S., 668.

Moreover, after he had once ruled that he had no jurisdiction, the Judge of the Circuit Court was *functus officio*, and had no power to express an opinion upon the rest of the case. The whole case was then out of court.

In Osborn vs. U. S. Bank, 9 Wheaton, 738, 847, Chief Justice MARSHALL said:

"A denial of jurisdiction forbids all inquiry into the "nature of the case."

In Dred Scott vs. Sanford, 19 How., 393, 587, Mr. Justice CURTIS, said:

"Such an exertion of judicial power transcends the "limits of the authority of the Court."

Benjamin v. New Orleans, (C. C. A.) 74 Fed. R. 417; S. C. 153 U. S. 44.

V.

THE JUDGMENT SHOULD BE REVERSED AND THE DEMURRER OVERRULED WITH LEAVE TO THE UNITED STATES TO ANSWER, UPON PAYMENT OF THE COSTS, IN THIS COURT AND IN THE CIRCUIT COURT.

ROGER FOSTER,
Of Counsel for Petitioner Appellant.

# In the Supreme Court of the United States.

OCTOBER TERM, 1902.

WILLIAM SAMUEL BIGBY, PLAINTIFF in error,
v.
THE UNITED STATES.
No. 111.

*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

This action was commenced in the court below upon a claim against the United States set forth in the petition to the effect: That the claimant on or about November 27, 1899, at the request of duly authorized agents of the United States, who were acting at the time within the scope of their authority, entered into a passenger elevator in the United States court-house and post-office building in the city of Brooklyn, the elevator being designed and intended by the United States for the use of persons on their way to the office of the marshal of the United States for the eastern district of New York, and the petitioner entering the

elevator, as aforesaid, while on his way to the said marshal's office on official business; that the United States then and there entered into an implied contract with the petitioner to carry the petitioner safely, for a sufficient valuable consideration, and to operate said elevator with due care and to employ for the operation of said elevator a competent and experienced person; that the United States, in violation of said contract, failed to carry petitioner safely and to operate said elevator with due care, and failed to employ for the operation and in charge of the elevator a competent and experienced person; that by reason of the failure of the United States in these respects, and because of the incompetence and inexperience of the person engaged in operating said elevator in charge of same, and in consequence of the said violation of the United States of its said contract, the petitioner was severely injured and caused much bodily and mental pain, to his damage $10,000.

The petition was demurred to upon the ground that the court had not jurisdiction either of the person or of the subject of the action, and also upon the ground that the petition did not state facts sufficient to constitute a cause of action. This demurrer was sustained in the following terms:

> It is ordered that said demurrer be and is hereby sustained on all of the grounds aforesaid, and so far as it is sustained upon the ground that it does not state a cause of action, it is so sustained because such a cause of action as is stated in the petition is not authorized to

be maintained against the United States by the Tucker Act, namely, chapter 359 of the acts of the second session of the Forty-ninth Congress, approved March 3, 1887. (Record, p. 8.)

Thereafter the case was sent to this court on a writ of error, pursuant to section 5 of the act of March 3, 1891, providing for circuit courts of appeals, etc. The court certified that the jurisdiction of the court was in issue, and stated the issue to be as follows:

> The question whether a person who is not, and has not been, an employee of the United States, can sue the United States in the circuit court of the United States, in the district where he resides, to recover damages to the amount of $10,000, which damages were caused by personal injury received by said person through the negligence of an employee of the United States, while said person injured as aforesaid was being carried on an elevator in a public building, owned and used by the United States as a post-office and for other governmental uses and purposes, when said person entered said elevator for the purpose of visiting the office of the United States marshal of such district on official business. (Record, p. 16.)

Accordingly there is now before this court only the question of the jurisdiction of the circuit court in which the action was brought. This jurisdiction is to be found, if at all, in the provisions of the Tucker Act, giving to the Court of Claims jurisdiction to hear and determine the following matters:

> All claims founded * * * upon any contract, expressed or implied, with the Government

> of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States in a court of law, equity, or admiralty in the United States, were suable;

and providing—

> That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars.

As the action, if sustained, must be rested solely on the foregoing statutory provisions, it would seem that the initial allegation of the complaint: "I. The United States of America is a corporation created by the Constitution of the United States, with its principal office in the city of Washington and the District of Columbia; and your petitioner alleges upon information and belief that within the meaning of the definitions of the New York Code of Civil Procedure said United States of America is a foreign corporation," although apparently made as bearing upon the jurisdiction of the court, is really but an embellishment of the petition, and in this light calls for nothing further than this polite allusion thereto.

ARGUMENT.

Judge Thomas, in delivering the opinion of the court below, held that the recitals of the petition set forth no implied contract on the part of the defendant, but merely a violation of the duty of the United States to use ordinary care in conveying the petitioner upon its elevator, which breach of duty was culpable negligence, and therefore a tort; that the duty of the United States in the premises arose out of no contractual relation between the petitioner and the United States, but was imposed by law, and that for these reasons the claim could not be brought within the meaning of the term "implied contract," as found in the Tucker Act. It would seem from a consideration of the facts in this case, as they appear in the record, that there could be no question of the soundness of the conclusions reached by the court below, and as the contention of the claimant is by no means a novel one here, I feel that any further discussion of the case must be but a matter of weariness to the court. But counsel for claimant has insisted upon his contention that the petition in this case sets forth an implied contract within the meaning of the Tucker Act with such apparent seriousness and conviction that, at the risk above suggested, I shall further pursue this threadbare subject.

The primary error in the argument of counsel consists in underestimating the gravity of the question of jurisdiction involved in this case, and in treating the same as though it were merely a question of pleading in a court whose jurisdiction was unquestioned. And

here it seems pertinent to take up the doctrine of implied contract in what seems to be the more enlightened modern view, which is that the true implied contract arises out of certain facts which, when proven, evidence a contract as effectually as though it had been made in express terms—a contract founded upon the undoubted intention of the parties. An instance of this is the implied contract arising out of calling a physician or using the carriage of a liveryman without any express agreement as to compensation. But as to contracts described as *implied in law*, it can not be truly said that there is any contract, since there is no evidence of any intention of contract, but on the contrary the facts, when established, show that no intention to contract existed. Such contracts seem to be properly designated by the term "quasi contract." An illustration is the so-called implied contract of one who has obtained the money or property of another through some imposition or deceit or by the commission of a trespass. In all such cases the contract can not be said to be a true one, but is in reality a legal fiction resorted to under the ancient practice, in order that an action might be thus maintained upon a cause of action which could not be pleaded as an express contract, nor sued upon under any of the forms of tort actions then provided for. In actions thus brought the tort of the defendant out of which his liability really arose was waived, and he was sued upon an alleged contract said to be implied in law, which manifestly never existed, but which, nevertheless, he was not permitted to deny.

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This subject is ably discussed in Keener on Quasi-Contracts. The following authorities also point out very clearly the distinction between genuine and fictional implied contracts:

> The circumstance that a cause of action in point of fact not *ex contractu* is allowed to be sued in assumpsit and to be described as matter of contract and to be loosely spoken of as implied contract is of no more force to fix its actual character contrary to the truth than is the allegation of loss and finding in trover to convey the sense of a literal loss and finding.
>
> *Wood* v. *Ayres*, 39 Mich., p. 350.

In the above case the court quotes, with approval, from *Hertzog* v. *Hertzog* (29 Penna. State, 465), the following:

> There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances, as really existing, and then the contract, thus ascertained, is called an implied one. * * * But Blackstone introduces this thought about reason and justice dictating contracts in order to embrace, under his definition of an implied contract, another large class of relations which involve no intention to contract at all, though they may be treated as

> if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law, or statute law, impose upon anyone a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus, out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in *assumpsit*. * * *
>
> The latter class are merely *constructive* contracts, whilst the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other, it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty. We have, therefore, constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.

In Metcalf on Contracts (p. 9), such contracts are spoken of as follows:

> In these instances, it is manifestly only by a fiction that a contract or promise is implied. And, indeed, the whole doctrine of implied contracts, in all their varieties, seems to be merely artificial and imaginary. But in the present state of the law, it is necessary, for the sake of legal conformity, to adopt this phraseology. In a great majority of cases which

> occur under this head, there is, in England, no safe legal remedy, except the action of assumpsit, in which a promise and the breach thereof are required to be alleged, although the defendant made no promise, but always denied his liability, and expressly refused either to pay or to promise payment.

In Pomeroy on Remedies reference is made on page 637 to this class of implied contracts as follows:

> When the contract relied upon is implied, and is simply a fictitious promise which the law infers from the tortious acts themselves.
> * * *
>
> But a contract is sometimes said to be implied when there is no intention to create a contract, and no agreement of parties, but the law has imposed an obligation which is enforced as if it were an obligation arising *ex contractu*. In such a case there is not a contract, and the obligation arises *ex lege*.
>
> *Milford* vs. *Commonwealth*, 144 Mass., 65.

Now, in the light of the foregoing, taking the phrase "implied contract," found in the jurisdictional statute in connection with the accompanying provision excluding claims "sounding in tort," it is difficult to see how the term can be held to refer to any other than the first class of implied contract above referred to, to wit, a genuine contract arising with certainty out of proven facts, or how it can be construed to have reference to the other class of so-called contracts implied by law, through resort to a fiction in which the wrong out of which the claim had its real origin is ignored. By

thus limiting the application of the words "implied contract," the intention of Congress to permit suit against the Government on claims sounding in contract, but to shut out from that privilege claims sounding in tort will incontestably be carried out, whereas if the construction contended for by claimant be adopted, that intention will be as unmistakably thwarted. In that event, as said by the Court of Claims, "The jurisdiction of this court will be as broad as the manifold grievances complained of against the officers and agents of the United States." (*McArthur* v. *The United States*, 29 C. Cls. R., 194.)

For, take the facts of this claim: They establish the clearest case of negligence. If the statute gave express jurisdiction of actions sounding in tort, the court would have unquestioned jurisdiction of this action, and yet the claimant insists that it should have an equally clear field under a statute declaring precisely the contrary. And this remarkable contention is to be sustained through the legerdemain of pleading in which the negligence, the tort, is not only to be waived, but, like Bottum, to be *translated* into an implied contract as unimpeachable as the best. The wolf is to be disguised in the fleece of a discreet petition, and thus the wool to be effectually pulled over the eyes of the court. But the decisions of this court and of the Court of Claims are not favorable to this proposition.

> But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the Government responsible

for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents.

* * * * *

The language of the statutes which confer jurisdiction upon the Court of Claims excludes by the strongest implication demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments, forbids on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties.

* * * * *

These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that Government, and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims.

*Gibbons* v. *The United States*, 8 Wall., 274–5–6.

The Government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers

or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.

*Robertson* v. *Sichel*, 127 U. S., 515.

It is a well-settled rule of law that the Government is not liable for the nonfeasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress.

*German Bank* v. *United States*, 148 U. S., 579.

The United States can not be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect between contract and tort, be evaded by framing the claim as upon an implied contract.

*Hill* v. *The United States*, 149 U. S., 598.

There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law.

* * * * *

This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become

us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives.

*Langford* v. *The United States*, 101 U. S., 345.

*Schillinger* v. *United States*, 155 U. S., 163.

It will be seen that the act of March limits the jurisdiction of the court to cases "not sounding in tort." The case which the claimant makes by his petition, and as shown by the findings, clearly indicates every element of a civil injury to the alleged right of claimant, for which at common law he would have to sue in a form *ex delicto*. Whenever the alleged cause of action arises out of the fault of the defendants, or from their negligence as distinguished from their obligations, undertakings, or contracts, it may be said that the action "sounds in tort," and the courts are prohibited from assuming jurisdiction in such cases.

*Lanman* v. *United States*, 27 C. Cls. R., 265.

The term used in the statute, "not sounding in tort," was intended to prevent this court from adopting the legal theory of cases in which it has been held by other courts that by the election of the aggrieved party the character of the proceeding may be changed from an action *ex delicto* to an action *ex contractu*. This court has had occasion to distinguish between cases sounding in tort and cases arising on contract.

* * * * *

> The term "sounding in tort," as used in the act of 1887, is the key that unlocks the issue as presented by the averments of the petition and the demurrer. If the alleged cause of action does not arise from a contract, either expressed or implied, or upon some of the other clauses of the statute, then, whatever may have been the negligence of the United States and the consequent damage to the claimants, they are without remedy. The authorities are abundant to the effect that at common law the claimants would have to adopt the action of case, which, aside from its enlargement in the action of assumpsit, is an action *ex delicto*.
>
> *McArthur* v. *United States*, 29 C. Cls. R., 194-195.

There was no contract of any sort.

The liability of defendant rests solely on its legal duty.

But it is also insisted that the relations of the parties had their origin in contract—the contract to carry safely of a common carrier—and that the negligence of the defendant, instead of being the gravamen of the action, constituted merely a breach of that contract. I have carefully examined the various decisions cited by counsel to support this view of the case, and in every instance it appears that there was an unquestioned contract of a common or a special carrier existing between the parties, into which the court imported, with more or less hesitation, as an implied element of that contract, the duty to carry safely, which is imposed by the general law. But these authorities have no proper appli-

cation to the present case. To begin with, the vital question of jurisdiction was not involved in any of these cases, but merely a question of technical pleading. But what is more to the point, this is not an analogous case upon the facts. The defendant in this case was not in the relation of a common carrier by reason of running its elevator, but simply rested under a duty imposed by law to carry passengers in safety.

*McGrell* v. *Buffalo Office Building Company*, 153 N.Y., 268.

*Allen* v. *Sackrider*, 37 New York, 342–343.

In this case the court says that the employment of a common carrier is a public one, and he assumes a public duty and is bound to receive and carry the goods of anyone who offers. Quoting: "On the whole," says Professor Parsons, "it seems to be clear that no one can be considered as a common carrier unless he has in some way held himself out to the public as a carrier in such manner as to render him liable to an action if he should refuse to carry for anyone who wished to employ him." (2 Pars. on Cont., 5th ed., 166, note.)

In *Nolton* v. *Western Railroad Corporation* (15 New York, 444), the complainant was a United States mail carrier and was carried by the defendant pursuant to a contract between the United States and the defendant. In an action brought for injury to the claimant by the negligence of the defendant the court said:

> It is difficult to see, however, how there can be a contract to transport safely where there is

no contract to transport at all. My conclusion therefore is, that this action can not be maintained upon the basis of a contract express or implied.

It necessarily follows that it must rest exclusively upon that obligation which the law always imposes upon everyone who attempts to do anything, even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken. * * *

The duty arises in such cases, I apprehend, entirely independent of any contract, either expressed or implied. The principle upon which a party is held responsible for its violation does not differ very essentially in its nature from that which imposes a liability upon the owner of a dangerous animal, who carelessly suffers such animal to run at large, by means of which another sustains injury; or upon one who digs a ditch for some lawful purpose in a highway and carelessly leaves it uncovered at night, to the injury of some traveler upon the road. It is true, it may be said, that in these cases the duty is to the public, while in the present case, if it exists at all, it is to the individual; but the basis of the liability is the same in both cases, viz, the culpable negligence of the party. All actions for negligence presuppose some obligation or duty violated. Mere negligence, where there was no obligation to use care, as where a man digs a pit upon his own land and carelessly leaves it open affords no ground of action. But where there is anything in the circumstances to create a duty,

either to an individual or the public, any neglect to perform that duty, from which injury arises, is actionable.

The case of *Marker* v. *Mitchell* (54 Fed. Rep., 638), cited by claimant, is in harmony with the above. It does not hold that the proprietor of a passenger elevator is a common carrier, but simply that he rests under the same liability as regards the safety of his passengers. This liability, of course, is the duty imposed by law without reference to contract.

But as stated by the court below, the true relation of the parties was that the United States extended to the petitioner for the purpose of transacting business with its officials a license to enter its building and to use in connection therewith the facilities in passing from floor to floor, these facilities including the elevator, as well as the floors, stairs, etc.; that this permission imposed upon the Government the duty to use ordinary care that the facilities offered to its licensees should be in a state of reasonable safety, abuse of which duty would constitute culpable negligence, upon which an action in tort only could be predicated and maintained. (Rec., p. 7.)

This is the undoubted rule of law where, as in this case, there is no contract of carriage, and seems to be the better rule even where the action is against the common carrier and there is the usual contract of carriage subsisting between the parties; the courts preferring to rest the liability of the carrier upon his undoubted legal duty to the public rather than to

make that duty by implication a part of the contract of carriage.

> The grâvamen of the action is the breach of the duty imposed by law upon the carrier of passengers to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry. This duty exists independently of contract, and although there is no contract in a legal sense between the parties. Whether there is a contract to carry or the service undertaken is gratuitous, an action on the case lies against the carrier for a negligent injury to a passenger. The law raises the duty out of regard for human life and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands. In *Bretherton* v. *Wood* (3 Brod. & Bing., 54), which was an action brought against ten defendants as proprietors of a coach for injuries sustained by the plaintiff, a passenger, in consequence of negligent driving, the jury found a verdict against eight of the defendants and in favor of the other two. On error the judgment was affirmed, and Dallas, C. J., said: "If it were true that the present action is founded on contract, so that to support it a contract must have been proved, the objection would deserve consideration. But we are of opinion that the action is not so founded, and that on the trial it could not have been necessary to show that there was any contract; and, therefore, that the objection fails. The action is on the case, against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to convey

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and carry their goods and passengers safely and securely, so that by their negligence or fault no injury happens. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it." And in *Philadelphia and Reading R. R. Co.* v. *Derby* (14 How. U. S., 483), Grier, J., speaking of the duty of a common carrier, says: "This duty does not result alone from the consideration paid for the service. It is imposed by law even when the service is gratuitous." * * *

The liability of the carrier is the same, whether the action is brought upon contract or upon the duty, and the evidence requisite to sustain the action in either form is substantially the same, and when there is an actual contract to carry, it is properly said that the liability in an action founded upon the public duty is coextensive with the liability on the contract.

*Carroll* v. *Staten Island R. R. Co.*, 58 N. Y., 133–4–5.

The company was in 1861 a common carrier, over its road, of passengers and their baggage and of goods and merchandise. As such carrier its duties and liabilities were plain; as a carrier of passengers it was bound, unless there was reasonable ground for refusal, to take all persons who applied for passage and their baggage, and as a carrier of goods to take all other property offered for transportation, and was responsible for the safe conveyance of the baggage and other property to the point for which they were destined or the termination of the

road, unless prevented by inevitable accident or the public enemy. Its obligations and liabilities in these respects were not dependent upon the contract of the parties, though they might have been modified and limited by such contract. They were imposed upon it by the law, from the public nature of its employment, independent of any contract.

*Hannibal R. R.* v. *Swift*, 12 Wall., 270.

It seems to me that the whole current of authorities, beginning with *Govett* v. *Radnige* and ending with *Pozzi* v. *Shipton*, establishes that an action of this sort is, in substance, not an action of *contract*, but an action of *tort* against the company, as carriers. That being so, the question is whether it was necessary to allege any contract at all in the declaration. The earliest instance I find of an action of this sort is in Fitzherbert's Natura Brevium, "Writ de Trespass sur le Case," where it is said: (*b*) "If a smith prick my horse with a nail, etc., I shall have my action upon the case against him, without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought."

*Marshall* v. *York, etc., Ry. Co.*, 11 C. B. R., 663.

See opinion of Blackburn, Justice, in *Austin* v. *Great Western Ry. Co.*, L. R., 2; Q. B. C., 445–6.

The foregoing authorities clearly establish that in every case in which one undertakes to carry passengers there is imposed upon him by law a duty to convey such passengers safely, and this without respect to the manner in which the undertaking is assumed, whether

by contract for hire, or gratuitously, or by reason of a mere license extended to the passenger; but such legal liability does not in itself constitute nor imply a contract. The authorities cited by counsel for claimant do not controvert this, but simply hold that where there is a contract for such carriage this legal duty may be considered an implied part of such contract. But counsel for claimant would reverse this doctrine and imply the contract from the duty.

The claimant relies upon the cases of *United States* v. *State National Bank* (96 U. S., 30), and *Swift Company* v. *United States* (111 U. S., 22), but the distinction between those cases and the present claim is very marked. The case of *United States* v. *State National Bank* is thus summarized in the syllabus:

> 1. Where a trust fund has been perverted, the *cestui que trust* can follow it at law as far as it can be traced.
>
> 2. The United States can not, against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent.
>
> 3. The rules of law applicable to an individual in a like case apply also to the United States. Its sovereignty is in no wise involved.

The case of *Swift Company* v. *United States* decides that a certain payment made by the company to the Commissioner of Internal Revenue was not paid voluntarily and therefore might be recovered, the same having been illegally exacted as a fee or tax to which the Government was in no wise entitled.

The most that can be said of these cases is that they permit suit against the United States on an implied contract to refund money which has found its way into the Treasury of the United States without legal warrant and upon which the Government has no sort of claim, but it can not be said that they establish a general principle. This is shown by the fact that in the cases of *Langford* v. *United States*, *Hill* v. *United States*, and *Schillinger* v. *United States*, *supra*, and other similar cases, where not money but other property of the claimants had been wrongfully taken and used by the United States, the claimants were held without remedy in the courts of the United States because of the provisions of the jurisdictional statute. Surely if there is no implied contract within the meaning of the statute where the property of an individual has been wrongfully taken and retained by the United States to its benefit, there can be no such contract implied where the United States has received no benefit from the wrongful act of its agent, but the demand is purely for damages sustained by reason of such wrongful act.

CLAIMANT'S PROPER RECOURSE IS TO CONGRESS.

Claimant's counsel points to the fact that on certain occasions Congress has granted relief to parties who have suffered damage in a manner analogous to the case of the claimant, as a basis for his contention that the jurisdictional statute under consideration should receive a very liberal construction. On the contrary, these facts simply indicate the proper course for the claimant to have pursued in the presentation of his

claim. Congress has not seen fit to give its courts jurisdiction of an action founded upon claims of this character, but has reserved to itself the determination thereof. Hence the claimant is not without remedy, but is in the wrong forum.

*Gibbons* v. *United States* and *German Bank* v. *United States, supra.*

It is respectfully insisted that the action of the court below in determining the jurisdictional question in this case against the claimant was correct and should be sustained.

LOUIS A. PRADT,
*Assistant Attorney-General.*

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# Supreme Court of the United States.

No. 111.—October Term, 1902.

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|---|---|
| William Samuel Bigby, Plaintiff in Error, vs. The United States. | In error to the Circuit Court of the United States for the Eastern District of New York. |

[February 23d 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

Bigby, the plaintiff in error, claimed in his petition to have been damaged to the extent of ten thousand dollars on account of certain personal injuries received by him while entering an elevator placed by the United States in its court-house and post-office building in the city of Brooklyn, and asked judgment for that sum against the Government.

The petition was demurred to upon three grounds, namely, that the court had no jurisdiction of the person of the defendant, or of the subject of the action, and did not state facts sufficient to constitute a cause of action against the United States.

The demurrer was sustained by the Circuit Court on each of the grounds specified, and so far as it was sustained upon the ground that the petition did not state a cause of action, it was sustained because the action was not authorized by the act of Congress known as the Tucker Act, approved March 3d 1887, c. 359, and entitled "An act to provide for the bringing of suits against the Government of the United States." 24 *Stat.* 505. The action was accordingly dismissed.

The specific allegations of the petition are—

That the United States is a corporation created by the Constitution with its principal office in Washington, and within the meaning of the New York Code of Civil Procedure is a foreign corporation;

That on or about November 27th 1899 the petitioner, while on his way to the office of the Marshal of the United States for the Eastern District of New York, and at the request of the United States and of its officers, employes and duly authorized agents, each acting within the scope of his authority, entered into a passenger elevator in the United States court-house and post-office building in Brooklyn, which building and elevator was owned and controlled by the United States, and was designed and intended by it for the use of persons on their way to the office of its said Marshal;

That the United States "then and there entered into an implied contract" with the petitioner, "wherein and whereby, for a sufficient valuable

consideration, it agreed to carry your petitioner safely, to operate said elevator with due care, and to employ for the purposes of the operation of said elevator a competent and experienced person;"

That in "violation of said contract, the United States failed to carry the petitioner safely, or to operate the elevator with due care, or to employ for the operation and to put in charge of such elevator a competent and experienced person, and violated its contract with the petitioner in other ways; and,

That in consequence of said failures, respectively, the petitioner, "while entering the said elevator without negligence on his part was caused to fall and his foot, ankle and leg were crushed between said elevator and the top of the entrance into the elevator shaft or a projection in the shaft of said elevator or in some other manner and the back of your petitioner and other parts of the body of your petitioner were also consequently injured and your petitioner consequently suffered a laceration of the ligaments of his ankle and he consequently was caused much bodily and mental pain."

The transcript contains a certificate from the Circuit Court to the effect that in said cause the jurisdiction of that court was in issue, and that the question was "whether a person who is not, and has not been, an employee of the United States, can sue the United States, in the Circuit Court of the United States, in the district where he resides, to recover damages to the amount of ten thousand dollars, which damages were caused by personal injury received by said person through the negligence of an employee of the United States, while said person injured as aforesaid, was being carried on an elevator in a public building, owned and used by the United States as a post-office and for other governmental uses and purposes, when said person entered said elevator for the purpose of visiting the office of the United States marshal of such district on official business."

This being an action against the United States, the authority of the Circuit Court to take cognizance of it depends upon the construction of the above act of March 3d 1887. 24 *Stat.* 505.

By that act it is provided that the Court of Claims shall have jurisdiction to hear and determine "all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known

as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same." The act further provided that "the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars."

It is clear that the act excludes from judicial cognizance any claim against the United States for damages in a case "sounding in tort." But the contention of the plaintiff is, in substance that although the facts constituting the negligence of which he complains, made a case of tort, he may waive the tort; that his present claim is founded upon an implied contract with the Government, whereby it agreed to carry him safely in its elevator, would operate the elevator with due care, and employ for the purposes of such carriage a competent and experienced person; and, consequently, that his suit is embraced by the words "upon any contract, express or implied, with the Government of the United States." The contention of the United States is that no such implied contract with the Government arose from the plaintiff's entering or attempting to enter and use the elevator in question, and that the claim is distinctly for damages in a case "sounding in tort," of which the act of Congress did not authorize the Circuit Court to take cognizance.

Can the plaintiff's cause of action be regarded as founded upon implied contract with the Government, within the meaning of the act of 1887?

The precise question thus presented has not been determined by this court. But former decisions may be consulted in order to ascertain whether this suit is embraced by the words, in that act, "upon any contract, express or implied, with the Government of the United States." Do those words include an action against the United States to recover damages for personal injuries caused by the negligent management of an elevator erected and maintained by it in one of its court house and post-office buildings?

In *Gibbons* v. *United States*, 8 *Wall.* 269, 274—which was an action in the Court of Claims to recover an amount alleged to have been wrongfully exacted by a quartermaster of the United States in the execution of a contract for the delivery of oats—this court said: "But it is not to be disguised *that this case is an attempt, under* the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents. In the language of Judge Story, 'it does

not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.' . . The language of the statutes which confer jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties. . . These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that Government, and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims."

The same general question arose in *Langford* v. *United States*, 101 *U. S.* 341, 342, 344, which was an action in the Court of Claims to recover for the use and occupation of lands and buildings, of which certain Indian agents acting for the United States had taken possession without the consent of the American Board of Foreign Missions, which had erected the buildings, and under which Board the plaintiff claimed title. The United States asserted ownership of the property and disputed the title of the claimant. This court held that the action could not be maintained, and said that the reason for limiting suits to cases of express and implied contracts, as distinguished from cases formed on tort, "is very obvious on a moment's reflection. While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, *with power vested in him to make such contracts*, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to *fritter away the distinction* between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives."

The subject was again considered in *Hill* v. *United States*, 149 *U. S.* 593, 598–9, which was an action to recover damages for the use and occupation of certain property in the possession of the United States, but of which the plaintiff asserted ownership. This court said: "The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract. *Gibbons* v. *United States*, 8 *Wall.* 269, 274; *Langford* v. *United States*, 101 *U. S.* 341, 346; *United States* v. *Jones*, *above cited.* An action in the nature of assumpsit for the use and occupation of real estate will never lie where there has been no relation of contract between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes the defendant a trespasser. *Lloyd* v. *Hough*, 1 *How.* 153, 159; *Carpenter* v. *United States*, 17 *Wall.* 489, 493. In *Langford* v. *United States*, it was accordingly adjudged that, when an officer of the United States took and held possession of land of a private citizen, under a claim that it belonged to the Government, the United States could not be charged upon an implied obligation to pay for its use and occupation."

In *Robertson* v. *Sichel*, 127 *U. S.* 507, 515, the court said: "The Government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests." So in *German Bank of Memphis* v. *United States*, 148 *U. S.* 573, 579: "It is a well-settled rule of law that the Government is not liable for the nonfeasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress."

In *Schillinger* v. *United States*, 155 *U. S.* 163, 168, the question was whether a suit could be maintained against the United States to recover damages for the use of a patent for an improvement in a concrete pavement. It appeared that the patent had been used by a contractor who undertook to construct a pavement for the United States. The pavement was constructed, and at the time the action was brought was in use by the Government. It was contended that the United States, having appropriated to *public use property that belonged to the plaintiff*, came under an implied obligation to compensate him—such implied obligation arising from the constitutional provision that private property should not be taken for public use except upon payment of just compensation. This view was rejected, and the court said: "Can it be that Congress intended that

every wrongful arrest and detention of an individual, or seizure of his property by an officer of the Government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided. . . Here the claimants never authorized the use of the patent right by the Government; never consented to, but always protested against it, threatening to interfere by injunction or other proceedings to restrain such use. There was no act of Congress in terms directing, or even by implication suggesting, the use of the patent. No officer of the Government directed its use, and the contract which was executed by Cook did not name or describe it. There was no recognition by the Government or any of its officers of the fact that in the construction of the pavement there was any use of the patent, or that any appropriation was being made of claimant's property. The Government proceeded as though it were acting only in the management of its own property and the exercise of its own rights, and without any trespass upon the rights of the claimants. There was no point in the whole transaction from its commencement to its close where the minds of the parties met or where there was anything in the semblance of an agreement."

It thus appears that the court has steadily adhered to the general rule that, without its consent given in some act of Congress, the Government is not liable to be sued for the torts, misconduct, misfeasances or laches of its officers or employees. There is no reason to suppose that Congress has intended to change or modify that rule. On the contrary, such liability to suit is expressly excluded by the act of 1887.

Cases of this kind are to be distinguished from those in which private property was taken or used by the officers of the Government with the consent of the owner or under circumstances showing that the title or right of the owner was recognized or admitted. As, in *United States* v. *Russell*, 13 *Wall.* 623, 626, which was an action to recover for the use of certain steamers used in the business of the Government pursuant to an understanding with the owner that he should be compensated; or, in *United States* v. *Great Falls Manufacturing Company*, 112 *U. S.* 645, in which it appeared that certain private property was appropriated by officers of the Government for public use, pursuant to an act of Congress, the title of the owner being recognized or not disputed; or, in *United States* v. *Palmer*, 128 *U. S.* 262, 269, which was an action to recover for the use of a patent which the Government was invited by the patentee to use. In all such cases the law implies a meeting of the minds of the parties, and an agreement to pay for that which was used for the Government, no dispute existing as to the title to the property used. The important fact in each of those cases was that the officers who appropriated and used the property of others were authorized to do so, and hence the implied contract that the Government would pay for such use.

But, as we have seen, the plaintiff contends that when he entered or attempted to enter the elevator the Government must be deemed to have contracted that its employee in charge of it would use due care so as not to needlessly injure him. In other words—for it comes to that—by the mere construction and maintenance of such elevator the Government, contrary to its established policy, impliedly agreed to be responsible for the torts of an employee having charge of the elevator, if, by his negligence, injury came to one using it. We find no authority for this position in any act of Congress, and nothing short of an act of Congress can make the United States responsible for a personal injury done to the citizen by one of its employees who, while discharging his duties, fails to exercise such care and diligence as a proper regard to the rights of others required. "Causing harm by negligence is a tort." One of the definitions of a tort is "an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented." *Pollock on Torts*, 1, 19. The elevator in question was erected in order to facilitate the transaction of the public business, and also, it may be assumed, for the convenience and comfort of those who might choose to use it when going to a room in the court house and post office building occupied by public officers, and not pursuant to any agreement, express or implied, between the United States and the general public, or under any agreement between the United States and the individual person who might seek to use it. No one was compelled or required to use it, and no officer in charge of the building had any authority to say that a person using it could sue the Government if he was injured by reason of the want of due care on the part of the employee operating it. No officer had authority to make an express contract to that effect, and no contract of that kind could be implied merely from the Government's ownership of the elevator and from the negligence of its employee. The facts alleged show a case in which the plaintiff was injured by reason of the negligence of the manager of the elevator. It is therefore a case of pure tort on the part of such manager for which he could be sued. It is a case "sounding in tort," because it had its origin in and is founded on the wrongful and negligent act of the elevator manager. There is in it no element of contract as between the plaintiff and the Government; for, as we have said, no one was authorized to put upon the Government a liability for damages arising from the wrongful, tortious act of its employee. The plaintiff therefore cannot by the device of waiving the tort committed by the elevator operator make a case against the Government of implied contract. A party may in some cases waive a tort, that is, he may forbear to sue in tort, and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that "a right of action in contract cannot be created by waiving a tort, and the duty to pay

damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained." *Cooper* v. *Cooper*, 147 *Mass.* 370, 373. If the plaintiff could sue the elevator employee upon an implied contract that due care should be observed by him in managing the elevator, it does not follow that he could sue the Government upon implied contract. For under existing legislation no relation of contract could arise between the Government and those who chose to use its elevator. It is easy to perceive how disastrous to the operations of the Government would be a rule under which it could be sued for torts committed by its agents and employees in the management of its property. It is for Congress to determine in all such cases what justice requires upon the part of the Government. If any exceptions ought to be made to the general rule it is for Congress to make them.

We have not overlooked the allegation in the petition that the plaintiff entered the elevator "at the request of the United States, and of its officers, employees and duly authorized agents, each acting within the scope of his authority." This, we assume, means at most only that the plaintiff entered, or attempted to enter, the elevator with the assent of those who had control of it and of the building in which it was erected. But if more than this was meant to be alleged; if the plaintiff intended to allege an express or affirmative request by officers or agents of the United States, the case would not, in our view, be changed; for the court knows that, without the authority of an act of Congress, no officer or agent of the United States could, in writing or verbally, make the Government liable to suit by reason of the want of due care on the part of those having charge of an elevator in a public building.

We are of opinion that this case is one sounding in tort, within the meaning of the act of 1887, and therefore not maintainable in any court.

The judgment of the Circuit Court dismissing the action for want of jurisdiction is

*Affirmed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*